Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

RICHARD MARK CUTCLIFFE, VICKI CUTCLIFFE, GEORGE RAGGIO, JR. and CAROLE RAGGIO,

Petitioners,

vs.

KEN JENNE, as Sheriff of Broward County, Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT IN REPLY

1. Post-Termination State Legislation Did Not "Moot" the First Amendment Issues Presented by the Decision Below

Respondent Broward County Sheriff Jenne argues that "the decisions in *Terry v. Cook* [866 F.2d 373 (11th Cir. 1989)] and this case have been mooted . . . by legislation enacted in . . . Florida in 1995 that prohibit political patronage dismissals." Br. in Opp. 3 (footnote omitted); *see* Pet. Cert. 5 n. 2 (noting post-termination changes in state law). The relevant Florida legislation, Sections 30.071 - 30.079, Florida Statutes, precludes patronage dismissals of most, but not all, deputy sheriffs, but does not apply to Petitioners.

Those statutes were enacted after the terminations of these Petitioners and do not moot their claims. And Respondent's hopeful speculation that future disputes like this one will be averted by state law, and that this Court should therefore decline review, errs for another reason. Deputy sheriffs in Broward County, and others elsewhere in Florida, are legislatively exempted from the procedures contained in the statutes offered by Respondent. Section 30.071, Fla. Stat. (1997), provides:

> **30.071 Applicability and scope of act. –**
>
> (1) This act applies to all deputy sheriffs, *with the following exceptions:*

* * *

> (b) Deputy sheriffs in a county that, by special act of the Legislature, local charter, ordinance, or otherwise, has established a civil or career service system which grants collective bargaining rights for deputy sheriffs, *including*, but not limited to, deputy sheriffs in the following counties: *Broward*, Dade, Duval, Escambia, and Volusia. [Emphasis supplied].

* * *

Thus, in those counties which are exempted - like Broward County (with over *800* deputies) - relief for deputies who allege they were unconstitutionally terminated for political patronage reasons is foreclosed by the Eleventh Circuit's decision in this case, and by *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). Both decisions eschewed any meaningful assessment of the nature of the various deputies' positions, instead announcing a *per se* rule permitting patronage dismissal of *all* deputies; a rule which conflicts with *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). *See* discussion *infra* at 3-6.[1]

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[1] Ironically, in those counties where the Florida statutes do apply, their *Elrod-Branti* principles would offer protection similar to the Constitution. "A deputy sheriff covered by §§ 30.071-30.079, other than the undersheriff or chief deputy, who is regularly appointed to his or her position may not be terminated for lawful off-duty political activity or for a discriminatory reason." § 30.073(5), Fla. Stat. Thus, despite the acknowledged "alter ego" relationship between a Florida sheriff and his or her deputies, § 30.071(3), Fla. Stat., for political

Contrary to Respondent's view, the issues presented in this case will recur in Florida (and in other states) despite changes in state law. This Court should grant review to resolve what is undeniably a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals,"[2] which are struggling to apply the *Elrod-Branti* First Amendment formulation in sheriffs' deputy political patronage dismissal cases. *See* Pet. Cert. at 8 and 8a-9a and 9a, n. 3 (citing conflicting decisions of the circuit courts).

2. *Branti's* Mandate to Examine the Need for Party Affiliation Inherent in the "Public Office" Does Not Preclude Consideration of the Public Employee's Duties, and Presents a Substantial Federal Question Fairly Contained in Petitioners' Questions Presented

Respondent argues that there is no conflict between the decision below and *Branti*, because *Branti* requires courts to examine the need for political loyalty inherent in the "public

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patronage purposes Florida law clearly recognizes that not all deputies' positions require political loyalty. *See also* § 30.072 (defining "deputy sheriff" for purposes of the political patronage protections and excluding and defining those who perform "managerial, confidential, or policymaking duties").

[2] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); Br. in Opp. 2 and n. 1.

office," 445 U.S. at 518, and the Eleventh Circuit held that the *position* of sheriff's deputy was subject to patronage dismissal, regardless of any individual deputy's responsibilities. Br. in Opp. 4-6. That argument -- a view not uniformly held by the lower courts construing *Branti* -- merely raises another important and unanswered question of federal law which is worthy of review.

Branti did not present the question of whether a "public office" which is nominally shared by 869 persons can be sufficiently homogeneous to allow a court to squeeze *all* of those people into the narrow exception to the general *Elrod-Branti* rule that patronage dismissal of public employees violates the First Amendment.[3] The Eleventh Circuit's decision placing all deputies within the exception to *Elrod-Branti* impermissibly widens the intended narrow exception and renders meaningless the general proscription against political patronage dismissals of public employees. It is also in conflict with the Fifth Circuit, which held in *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert. denied* 456 U.S. 925 (1982), that patronage dismissal of deputies in a large sheriff's office (Dallas County, Texas) violated *Elrod-Branti*. "In a sheriff's department with more than 700 employees, including approximately 550 deputies, the absence of political cohesion between sheriff and deputy can hardly be said to undermine an intimate working relationship. The rule of *Elrod v. Burns*, not the exception, applies here." *Id.* at 1201.

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[3] The number of Broward County Sheriff's Deputies was stipulated in the district court. Of the 869 deputies, there were 116 sergeants, 36 lieutenants, 16 captains, and 5 majors.

Although the ultimate question of the constitutionality of the dismissal of a public employee for political reasons is one of federal law, state law is a relevant factor in determining whether the government employer "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. *See Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993) ("A significant way to determine the functions inherent in a particular position is to examine relevant state statutes, for `[a]lthough state law is not necessarily dispositive of the inquiry whether an employee is a confidant, policymaker or other employee for whom political affiliation is appropriate under *Elrod*, it is an important and influential factor.' *Zold*, 935 F.2d at 640.").[4]

Here, state law has now differentiated sheriffs' deputies into categories of those who are and those who are not subject to political patronage dismissals. §§ 30.071 - 30.079, Fla. Stat. (1997). Regardless of whether those categories are constitutionally sound as drawn, the fact that all deputies are *not* treated the same under Florida law for patronage purposes undercuts Respondent's argument that the

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[4] *But see McCrerey v. Allen*, 118 F.3d 242 (4th Cir. 1997), upholding patronage dismissal of the Administrator for Regulatory Programs of Virginia Department of Professional and Occupational Regulation, and finding that political affiliation was an "appropriate requirement" for the position under *Elrod-Branti*, despite a state anti-patronage law. "[W]hether a patronage-based dismissal violates the First Amendment is ultimately a question of federal law." *Id.* at 244.

"public office" of sheriff's deputy must be evaluated without regard to the duties of a particular deputy in a force of 869 deputies.

This Court's statement in *Elrod* that "[t]he nature of the responsibilities is critical," 427 U.S. at 367, remains true. Other courts agree. *See Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1352 (3d Cir.) ("we examine the functions performed by the individual occupying the relevant position"), *cert. denied* 513 U.S. 811 (1994); *Dickeson v. Quarberg*, 844 F.2d 1435, 1442 (10th Cir. 1988) ("We focus on the inherent powers of the positions as well as on the actual duties performed"); *Horton v. Taylor*, 767 F.2d 471, 477 (8th Cir. 1985) ("The *Branti* test is a functional one, focusing on the actual duties an employee performs"); *compare Gordon v. Rockland Co.*, 110 F.3d 886 (2d Cir.), *cert. denied* 118 S.Ct. 74 (1997) (discerning duties inherent in the offices held by assistant county attorneys by examining their differing job descriptions).

Any realist must acknowledge the inevitably widely divergent nature of responsibilities among 869 deputies. *See Barrett v. Thomas*, *supra* at 4. Consistent with *Elrod-Branti*, they should not *all* be subject to patronage dismissal. The decision below concluded otherwise. Review is warranted.

CONCLUSION

For the foregoing reasons, and those contained in the petition for writ of certiorari, certiorari should be granted, the decision below reversed, and the case remanded for trial under the correct First Amendment standards, whatever they may be.

Respectfully submitted,

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